BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBIE ALEXANDER Claimant	)	
VS.	)	
STATE OF KANSAS Respondent	)	Docket No. **158,556**
AND	)	
STATE SELF-INSURANCE FUND Insurance Carrier	)	

ORDER

Self-insured respondent requests review of the September 19, 2012 post-award penalty Order entered by Administrative Law Judge Brad E. Avery. Both parties submitted briefs and the Board placed the claim on the summary docket for decision without oral argument.[1]

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations and findings listed in the Agreed Award dated November 28, 2001.

ISSUES

The Administrative Law Judge (ALJ) ordered respondent to pay penalties in the amount of $25.82, based on respondent's failure to pay claimant $774.83 in medical mileage and reimbursement of out-of-pocket medical expenses. The ALJ calculated the

[1] K.A.R. 51-18-4(b).

amount of the penalty by multiplying the amount of the unpaid medical mileage and other items, $774.83, by respondent's 33 1/3% obligation under the original Award,[2] then multiplying the product by 10% pursuant to K.S.A 44-512a. The ALJ's penalty Order states:

> Respondent has attempted to by-pass its obligation to pay in this particular case because of its interpretation of the *Roles v. Boeing Co.* case, 43 Kan. App. 2nd [sic] 619 (2011), which held that an ALJ had no authority to award post award medical expenses incurred more than six months prior to an application for post award medical application [sic] under K.S.A. 44-510k. The claimant would submit her mileage only after a significant quantity had accumulated, and a time period of six months elapsed before she submitted the medical mileage reimbursement request, which is the subject of this order.
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> The time limitations under K.S.A. 44-510k have nothing to do with the continuing obligation of the respondent to pay medical compensation. See K.A.R. 51-9-11(c). Nor is the claimant required to seek unpaid medical mileage compensation under K.S.A. 44-510k. See K.A.R. 51-9-11(d) and K.S.A. 44-512a(b). The latter states in part, ".....if such compensation was in fact past due, then all request for penalties was filed under K.S.A. 44-512a, not K.S.A. 44-510k. There is no limitation of time contained in either the cited regulation or the penalties statute, and respondent's argument fails for the reasons specified.[3]

Respondent contends the ALJ erred in awarding penalties regarding medical bills that, pursuant to *Roles*[4], were for treatment preceding the six month limitation set forth in K.S.A. 44-510k(b). Respondent further maintains it owed none of the medical mileage because claimant did not first file an application for post-award medical treatment and secure an order requiring respondent to reimburse claimant for the specific amounts of unpaid medical mileage and out-of-pocket medical expenses. Only then, respondent argues, would the ALJ have jurisdiction to assess civil penalties pursuant to K.S.A 44-512a.

Claimant argues the ALJ's Order should be affirmed.

The sole issue for the Board's consideration is whether the ALJ erred in assessing civil penalties against respondent totaling $25.82.

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[2] The November 28, 2001 Award assessed 66 2/3% of the liability to the Kansas Workers Compensation Fund and 33 1/3% of the liability to respondent. The Fund was not provided with notice of the penalty hearing and the Fund's interests were not at issue at the hearing because penalties may not be assessed against the Workers Compensation Fund. See *Hall v. City of Hugoton*, 2 Kan. App. 2d 728, 587 P. 2d 927 (1978).

[3] ALJ Order (Sep. 19, 2012) at 2.

[4] *Roles v. Boeing Co.,* 43 Kan. App. 2d 619, 230 P.3d 771 (2010).

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings:

On November 28, 2001, claimant and respondent entered into an Agreed Award. The parties stipulated that claimant was permanently and totally disabled. The stipulations, findings and conclusions in the Agreed Award make several references to medical compensation:

> 10. Medical treatment has been furnished by respondent in the amount of $26,619.73. It is the intent of the parties that all authorized and valid medical will be paid if not paid. Claimant will be reimbursed her out of pocket expenses to Dr. Sankoorikal for treatment for this claim.
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> . . .
>
> 13. Claimant is authorized for treatment of her injuries with Dr. Joseph Sankoorikal.
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> 14. Future medical treatment is granted upon proper Application to the Director, or as the parties may agree.
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> . . .
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> Claimant is authorized for treatment of her injuries with Dr. Joseph Sankoorikal. Claimant is ordered reimbursed her out of pocket payment for treatment pursuant to Paragraph 10.
>
> Future treatment is granted upon proper application to the Director or as the parties may agree.[5]

At the penalty hearing on August 31, 2012, claimant requested the assessment of penalties against respondent for unpaid medical mileage for trips to and from Dr. Sankoorikal's office; to and from the YWCA, where claimant engaged in aqua therapy prescribed by Dr. Sankoorikal; and for reimbursement of various out-of-pocket expenses paid by claimant for treatment prescribed by Dr. Sankoorikal.

Respondent argues that the medical expenses demanded in claimant's May 9, 2012, 20-day demand letter to respondent and respondent's counsel (Exhibit 1 to Motion for Penalties Hearing) preceded the 6-month period for seeking post-award medical treatment under K.S.A 44-510k(b). Therefore, respondent concluded the expenses were not payable.

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[5] Agreed Award (Nov. 28, 2001) at 2-5.

Bobbie Alexander sustained personal injury by accident arising out of and in the course of her employment with respondent on May 30, 1990. Since the Agreed Award was entered in 2001 claimant has continued to receive treatment for her injuries with Dr. Sankoorikal. Claimant attended office visits with Dr. Sankoorikal approximately every three months. After the entry of the Award, Dr. Sankoorikal continued to prescribe aqua therapy at the YWCA.

Over a period exceeding 10 years, the parties established a pattern regarding the reimbursement of medical mileage. Claimant regularly attended the YWCA for aqua therapy. Claimant periodically requested printouts from the YWCA regarding her visits. The printouts showed the dates and times when claimant clocked in at the YWCA for therapy. On the printouts, claimant noted in writing the dates of her visits with Dr. Sankoorikal. Until respondent's refusal to pay the items submitted with claimant's K.S.A. 44-512a demand letter of May 9, 2012, respondent reimbursed claimant in full for the medical mileage submitted. Respondent would then seek reimbursement of 66 2/3% of its payments from the Workers Compensation Fund.

Claimant testified she typically obtained documentation of medical expenses to be submitted to respondent for payment approximately every year or two. She then provided that documentation to claimant's counsel, who in turn submitted the documents to respondent along with a written request for payment. The May 9, 2012 letter[6] had attached to it material which documented the following:

> (1) Claimant attended appointments with Dr. Sankoorikal on: January 25, 2010; April 5, 2010; May 14, 2010; July 19, 2010 and October 18, 2010. The mileage per round trip from claimant's home to Dr. Sankoorikal's office was 14 miles. Her 169 trips to the YWCA for therapy were 7 miles per round trip.
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> (2) Dr. Sankoorikal provided claimant with prescriptions for a heated mattress spread and also a heating pad for her back and neck problems. Claimant paid $16.34 for the heating pad and $98.04 for the mattress spread.

Claimant testified:

> Q. Were you ever given any instructions by anyone to turn them (the material documenting claimant's medical mileage and out of pocket medical expenses) in within a shorter period of time?
>
> A. No. Never.
>
> Q. And was it Dr. Sankoorikal who originally referred you to the Y?

[6] Claimant previously served a written demand for payment of the same mileage and reimbursement on December 8, 2011, however, that demand did not enclose all of the supporting documentation which accompanied the May 9, 2012 demand letter.

A. Yes.

Q. Okay. And is this the first time, to your knowledge, that your mileage requests have been denied?

A. Yes.[7]

No payments were made by respondent following the May 9, 2012 demand. Claimant filed an application for penalties with prayer for attorneys fees on June 21, 2012.

PRINCIPLES OF LAW

An award of penalties under K.S.A. 44-512a is not a preliminary award, but instead is a final order.[8] It is subject to de novo Board review on the record as a final order provided written request for review is filed within ten days from the order's effective date.[9] The Board accordingly has jurisdiction to review the ALJ's penalty Order.

K.S.A. 1987 Supp. 44-512a(a) and (b) provided:

> (a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the director and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than $100 per week for each week any disability compensation is past due and in the sum of $25 or for each past due medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.
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> (b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical

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[7] M.H. Trans. (Aug. 31, 2012) at 17.

[8] *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993); *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 836 P.2d 1185, *rev. denied* 251 Kan. 942 (1992).

[9] K.S.A. 44-551(b)(1); K.S.A. 44-555c(a).

> compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

The version of K.A.R. 51-9-11 in effect when the May 30, 1990 accidental injury occurred provided:

> It shall be the duty of the employer to provide transportation to obtain medical services to and from the home of the injured employee whether those services are outside the community in which the employee resides or within the community.
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> The employer shall reimburse the worker for the reasonable cost of transportation if: (a) an injured worker does not have a vehicle or reasonable access to a vehicle of a family member living in the worker's home; or (b) if the worker, because of the worker's physical condition, cannot drive and must therefore hire transportation to obtain medical treatment. Reimbursement may include, among other things, reimbursement for the cost of taxi service, other public transportation, ambulance service, if required by a physician, and the cost of hiring another individual to drive the worker for medical treatment. Any charges presented to the employer or insurance carrier for payment shall be a fair and reasonable amount based on the customary charges for those services.
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> If an injured worker drives his or her own vehicle or drives, or is driven in, a vehicle of a family member living in the home of the worker, and when any round trip exceeds five miles, the respondent and insurance carrier shall reimburse the worker for an amount comparable to the mileage expenses provided in K.S.A. 44-515.
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> In any dispute in regard to charges for mileage expenses, and on application by any party to the proceedings, the director shall determine the reasonable cost of transportation by a hearing before a workers' compensation administrative law judge.

In *Stout*[10], the Court noted:

> Before a penalty may be imposed, the statute essentially requires (1) an award of compensation which is due and payable, but has not been paid, (2) service of a written demand for payment, and (3) the passage of 20 days from the service of demand without payment of the compensation due.

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[10] *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 198, 836 P.2d 1185, *rev. denied* 251 Kan. 942 (1992).

In *Hallmark*[11], it was stated: "A statutory demand under [K.S.A.] 44-512a can only be effective for compensation awarded the claimant then due and unpaid. *(Damon v. Smith County*, 191 Kan. 564, 382 P.2d 311.)"[12]

K.S.A. 1987 Supp. 44-510(a) stated in pertinent part:

> It shall be the duty of the employer to provide the services of a physician, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.[13]

ANALYSIS

The Board find that the ALJ's Order should be modified.

Respondent advances the position that claimant was required to file an application for post award medical treatment pursuant to K.S.A. 44-510k and obtain an order under that provision before seeking penalties for late payment. That contention fails for several reasons:

(1) K.S.A. 44 510k was not enacted until the year 2000 and accordingly was not in effect when claimant was injured in 1990. All rights which accrue by reason of work-related accident shall be governed by the law in effect at that time.[14] There is no indication in the Act in effect when claimant was injured indicating a legislative intent that K.S.A. 44-510k be applied retroactively. Hence, claimant was not required before seeking penalties to file and obtain an order under a statute which did not yet exist.

(2) K.S.A 1987 Supp. 44-512a allowed for the assessment of civil penalties for compensation, including medical treatment, which had been awarded but not paid when due. Although the 2001 Agreed Award is worded in a confusing manner, it seems clear claimant was awarded continuing medical treatment with Dr. Sankoorikal as authorized treating physician. Respondent does not argue that Dr. Sankoorikal was not authorized

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[11] *Hallmark v. Dalton Construction Co*., 206 Kan 159, 476 P.2d 221 (1970).

[12] *Id.* at 161.

[13] The quoted language was inserted in K.S.A. 44-510h when the Act was amended in 2000.

[14] K.S.A. 1987 Supp. 44-505(c); *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

under the Agreed Award, nor does respondent contend the medical mileage incurred by claimant is not payable under the version of K.A.R. 51-9-11 in effect when claimant was injured. Respondent is not in a position to argue that the mileage and the other out-of-pocket medical expenses were not payable when for a period exceeding 10 years respondent paid such expenses in full and handled reimbursement of medical mileage in the same manner.

(3) Claimant was awarded medical treatment with Dr. Sankoorikal in the 2001 Agreed Award. That Award obligated respondent to provide such treatment on a continuing basis. Claimant was not required to obtain a post-award order since claimant had already been awarded treatment. The service of the May 9, 2012 demand letter, along with the documentation it enclosed, obligated respondent to pay the medical expenses for which payment was demanded within 20 days after the letter was served. The six month limitation contained in K.S.A. 44-510k does not apply for the reasons set forth above. Respondent's reliance on the six month limitation period in K.S.A. 44-510k and *Roles v. Boeing*, 43 Kan. App. 2d 619, 230 P.3d 771 (2010), is misplaced for the same reasons, that is K.S.A. 44-510k was not in effect when claimant's injury occurred and is inapplicable to this claim. *Roles* construed the same statute. In addition, *Roles* is factually distinguishable from this claim in that the claimant in *Roles* was not awarded continuing post-award medical treatment with a specific authorized physician.

Respondent's proposed statutory construction could encourage respondents and carriers to delay payment of authorized post-award medical expenses for six months and thereby avoid payment of such expenses. In general, statutes should be construed to avoid unreasonable results.[15] The Board finds that the ALJ properly assessed penalties against respondent.

However, in computing the penalty under K.S.A. 44-512a, the ALJ improperly used the 10% provision of the current statute. The version of K.S.A. 44-512a in effect when claimant was injured did not contain such a provision. Penalties for unpaid medical expenses were calculated by assessing $25 for each unpaid and past due medical bill.

In this claim, claimant's May 9, 2012 written demand sets forth three medical bills: (1) reimbursement of medical mileage; (2) reimbursement for claimant's purchase of a heated mattress spread in the amount of $98.04; and (3) reimbursement for claimant's purchase of a heating pad in the amount of $16.34. The Board finds that penalties are assessed against respondent in the amount of $25 for each of the three past due medical

[15] *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 631, 132 P.3d 870 (2006).

bills, totaling $75. Subtracting the Workers Compensation Fund's two-thirds obligation results in a penalty against respondent of $25.[16]

The Board notes claimant's request for an award of attorney's fees pursuant to K.S.A. 1987 Supp. 44-536(g). That request should be presented to the ALJ following reasonable notice and the opportunity to be heard and present evidence to all parties and attorneys.

CONCLUSIONS OF LAW

(1) The ALJ correctly assessed a penalty against respondent pursuant to K.S.A 44-512a.

(2) The amount of the penalty is $25.

AWARD

WHEREFORE, it is the decision of the Board that the penalty Order entered by ALJ Brad E. Avery on August 31, 2012, is modified as set forth above but otherwise affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

[16] Assessing penalties for medical mileage is based on the number of separate demands, not considering all medical mileage as a single bill, nor assessing a separate penalty for each trip. See *McDonald v. State of Kansas*, No. 1,052,500, 2011 WL 6122920 (Kan. WCAB Nov. 9, 2011).

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